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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MEI-FANG LISA ZHANG, BAY AREA  
AFFORDABLE HOUSING, LLC, XUE-  
HUAN GAO, YANG-CHUN ZHANG,  
CAROL JIAN DENG, and HAO LIANG,

Plaintiffs,

vs.

WEI-MAN RAYMOND TSE, RUN PING  
ZHOU a.k.a. FLORA ZHOU, THERESA  
WONG, JAMES YU, BILL SHU WAI MA,  
MOLLY LAU, VICTOR SO, JIAN XIAO,  
CHRIST INVESTMENT SERVICE INC.,  
CIS SERVICE, INC., PACIFIC BEST  
GROUP LTD. a.k.a. PACIFIC BEST  
COMPANY LTD., and SOUTH CHINA  
INVESTMENT INC.,

Defendants.

Case No.: C-07-04946 JSW  
(Related to C-05-02641 JSW)

**PLAINTIFFS' MEMORANDUM AND  
POINTS AND AUTHORITIES  
SUPPORTING MOTION TO DISMISS  
COUNTERCLAIM OF DEFENDANT  
RUN PING ZHOU FOR FAILURE TO  
STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED (FED. R.  
CIV. P. 12(b)(6))**

Date: August 8, 2008

Time: 9:00 a.m.

Courtroom: 2, 17<sup>th</sup> Floor

TABLE OF AUTHORITIES

Cases	Page
<i>Sheldon Appel Co. v. Albert &amp; Olier</i> , 47 Cal. 3d 863, 871, 765 P.2d 498, 501 (1989).	5

1 I. SUMMARY OF ARGUMENT

2 Plaintiffs' Complaint states that Defendant RUN PING ZHOU was part of a RICO  
3 enterprise, whose purpose is to defraud and steal money from investors by accepting investments  
4 for foreign currency futures trading and misappropriating the amounts invested. In her pro se  
5 Answer, Ms. Zhou denies the allegations in the Complaint, and she further asserts a  
6 Counterclaim with claims against all Plaintiffs. She indignantly denies all liability and, in her  
7 Counterclaim, she essentially says that Plaintiffs' Complaint constitutes malicious prosecution.  
8 She cannot maintain a malicious prosecution claim as a matter of law, however, because this  
9 action has not been legally terminated in her favor. Given that her Counterclaim is legally  
10 deficient, the Court should dismiss it under Fed. R. Civ. P. 12(b)(6) without leave to amend.

11 II. FACTS

12 This is an action, both in law and in equity, brought by victims of commodities fraud  
13 under the Racketeer Influenced Corrupt Organization Act ("RICO") and the Commodity  
14 Exchange Act ("CEA"). Plaintiffs are individuals and a small business in the San Francisco  
15 Area and in particular are members of the San Francisco Chinese community. Defendants are  
16 individuals and the businesses they operated in San Francisco, which purported to conduct  
17 foreign currency futures trading on behalf of clients for investment purposes. Plaintiffs invested  
18 large sums of money with Defendants for foreign currency futures trading in response to  
19 personal solicitations and advertisements in Chinese language newspapers.

20 Defendants' businesses, however, were wholly fraudulent. Defendants opened an office,  
21 used telephone trading telephone lines in Hong Kong, created computerized records, faxed and  
22 emailed written reports of accounts to customers, provided receipts for funds received, and in  
23 some cases returned modest amounts of investor moneys, all for the purpose of creating the  
24 appearance of a legitimate foreign currency futures trading business. Defendants, however,  
25 never actually conducted any foreign currency futures trading, and simply stole the funds that  
26 investors transferred to them for their personal use.

27 Plaintiffs filed their Complaint on September 24, 2008. Ms. Zhou filed an Answer on  
28 May 27, 2008. In her Answer, she denies any liability. For instance, she states, as to Counts I

1 and II, “I deny Plaintiffs have the right to require me to pay compensatory damages of \$321,149  
2 and for that matter, any amount against me.” (Answer and Counterclaim at 18.) She denies  
3 liability as to the remaining counts as well.

4 Ms. Zhou then asserts a Counterclaim against all Plaintiffs. (*Id.* at 20-27.) In the factual  
5 allegations supporting the Counterclaim, she continues to deny the claims in the Complaint and  
6 accuses Plaintiffs of lying. (*E.g., id.* at 20-21.) Specifically, she accuses Plaintiff MEI-FANG  
7 LISA ZHANG of lying, saying “She knew the truth that I did not work any more after I left  
8 NICI, she still tried to frame a new case against me.” (*Id.* ¶ 222, at 23.) She also says, “Zhang  
9 also is misleading her lawyer in believing that she is a fraud victim by her untold truth of her  
10 illegal trading of foreign currency futures, which she hopes allows her to sue for more money.”  
11 (*Id.* ¶ 224, at 23.) She concludes her counterclaim against Plaintiff Zhang by saying “Zhang has  
12 no reason to bring a false charge against me.” (*Id.* ¶ 225, at 24.)

13 Similarly, she accuses Plaintiff BAY AREA AFFORDABLE HOUSING and its member  
14 JIMMY JEN of bringing “a false charge against” her in her counterclaim against them. (*Id.*  
15 ¶ 231, at 24.) Likewise, she also asserts a similar counterclaim against the remaining Plaintiffs  
16 XUE-HUAN GAO, YANG-CHUN ZHANG, CAROL JIAN DENG, and HAO LIANG. Ms.  
17 Zhou says that the case against her is “unfair” and therefore, “They deserve a punishment! They  
18 should show me all of their invoices from their attorney for this case, then pay me the same  
19 price. The price is let them learn a lesson.” (*Id.* ¶ 237, at 25.) She continues her denials and  
20 defenses in a counterclaim entitled “Other Counterclaim Against All the Plaintiffs.” (*Id.* at 26-  
21 27.)

22 In sum, all of the seven claims in her Counterclaim are Ms. Zhou’s position that she  
23 stands unfairly accused of wrongful conduct by Plaintiffs, Plaintiffs’ Complaint contains lies,  
24 Plaintiffs are framing her, and Plaintiffs therefore deserve punishment. In other words, the  
25 essence of her Counterclaim is that Plaintiffs’ action constitutes malicious prosecution.

### 26 III. ARGUMENT

27 Defendant RUN PING ZHOU’s Counterclaim fails as a matter of law. She asserts  
28 Plaintiffs are maliciously prosecuting her, but she has not won the underlying case, and

1 prevailing in the underlying case is an essential element of a malicious prosecution claim.  
2 Accordingly, her Counterclaim is legally deficient.

3 The tort of malicious prosecution applies to maliciously instituted criminal charges or  
4 civil cases. *Sheldon Appel Co. v. Albert & Olier*, 47 Cal. 3d 863, 871, 765 P.2d 498, 501 (1989).  
5 “Under governing authorities, in order to establish a cause of action for malicious prosecution of  
6 either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action (1) was  
7 commenced by or at the direction of the defendant and *was pursued to a legal termination in his,*  
8 *plaintiff’s, favor* [citations]; (2) was brought without probable cause [citations]; and (3) was  
9 initiated with malice [citations].” *Id.* (quoting *Bertero v. National General Corp.*, 3 Cal.3d 43,  
10 50, 529 P.2d 608; Rest. 2d Torts, §§ 653-681B.) (emphasis added). In other words, Defendant  
11 must win the prior action before asserting a malicious prosecution claim.

12 The California Supreme Court emphasized that malicious prosecution “has traditionally  
13 been regarded as a disfavored cause of action.” *Id.* at 872, 765 P.2d at 502. “[T]he elements of  
14 the tort have historically been carefully circumscribed so that litigants with potentially valid  
15 claims will not be deterred from bringing their claims to court by a prospect of a subsequent  
16 malicious prosecution claim.” *Id.* The Court rejected any attempt to “abandon or relax the  
17 traditional limitations on malicious prosecution recover.” *Id.* at 874, 765 P.2d at 503.

18 Here, the case against Defendant Zhou is still underway. Consequently, the case has not  
19 been terminated legally in her favor. Therefore, she cannot meet the first essential element of a  
20 malicious prosecution claim and thus her Counterclaim fails. The Court should not permit her to  
21 proceed with this “disfavored” claim, in the words of the California Supreme Court.

22 Moreover, Defendant Zhou can plead no facts at this time that would permit her to state a  
23 claim for malicious prosecution. No matter what she could say, she has not won the case against  
24 her. Therefore, she should not be granted leave to amend her Counterclaim.

1 IV. CONCLUSION

2 For the reasons set forth above, Plaintiffs respectfully request that the Court dismiss the  
3 Counterclaim of Defendant RUN PING ZHOU against the Plaintiffs for failure to state a claim  
4 upon which relief can be granted without leave to amend.

5  
6 Respectfully Submitted,

7 COOKE, KOBRICK, & WU LLP

8 Dated: June 16, 2008

9 /s/  
10 By: \_\_\_\_\_  
11 CHRISTOPHER C. COOKE  
12 Attorneys for Plaintiffs  
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